

Internal Revenue Service

memorandum

TL-N-5724-88

WCSABIN Jr.

date: JUN 21 1988

to: District Counsel, Phoenix SW:PNX

from: Director Tax Litigation Division CC:TL

subject: Technical Advice on a § 6226(e) deposit by [REDACTED], TMP for [REDACTED].

You have requested advice regarding the tax liability of [REDACTED] and a deposit he made as tax matters person for his wholly owned S corporation, [REDACTED], to file a petition for redetermination in the federal district court.

ISSUE

Under the facts of this case, can the government retain a deposit made under I.R.C. § 6226(e), by [REDACTED], as payment of the tax liability of [REDACTED]?

SUMMARY

The government cannot treat the deposit as a payment of [REDACTED]'s tax. Since the statute of limitations has expired against [REDACTED] for non-subchapter S items, and since a valid FSAA cannot be issued to his S Corporation, the government must refund the deposit.

DISCUSSION

The Commissioner issued an FSAA pursuant to § 6241 et. seq. to [REDACTED], an S Corporation (hereinafter referred to as "the corporation").

The corporation had only one shareholder, [REDACTED]. He filed a petition for redetermination in the federal district court under § 6226(a)(2) and paid a deposit of \$ [REDACTED] pursuant to § 6226(e).

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As a result of Blanco Investment v. Commissioner, 89 T.C. 1156 (1987), the Commissioner is obliged to concede that the FSAA issued to the corporation is invalid. This is because Blanco holds that the only way to make an adjustment to an item attributable to a single-shareholder S corporation is to issue a statutory notice of deficiency to the shareholder. Therefore you should advise the Department of Justice to move to dismiss the case for lack of subject matter jurisdiction under Fed R. Civ. P. 12(b)(1).

If the FSAA had been valid and if the Court had entirely denied the relief sought by the petition, then [REDACTED] would have had an increased personal tax liability for [REDACTED], in the amount of \$ [REDACTED], the amount he was required to deposit under § 6226(e). Your question is whether the government can now offset the deposit against [REDACTED]'s presumed liability and retain the deposit.

It should be noted that [REDACTED] apparently has no present assessable tax liability for [REDACTED]. His potential liability for non-subchapter S items was subject to the statute of limitations imposed by § 6501. It expired on [REDACTED]. An earlier audit had resulted in a "no-change" determination for [REDACTED].


[REDACTED]'s potential liability for subchapter S items would have been kept open under § 6229 by the FSAA and the timely filed petition, if the Blanco rule was not applicable. Since it is applicable, [REDACTED] has no liability for subchapter S items and § 6229 does not apply. Without tax liability, the law of offset cannot apply. See U.S. v. Munsey Trust 332 U.S. 234 (1947) and U.S. ex. rel. Keating Co. v. Warren Corp. 805 F.2d 449, 451-452 (1st Cir. 1986).

You have also suggested that the deposit be treated as a payment of individual tax, since it was paid before [REDACTED]. An argument supporting this syllogism would be attenuated at best. In any event, Temp. Treas. Reg. § 301.6226(e)-1T(c) specifically provides that such a deposit "shall not be treated as a payment of tax."

This memorandum does not address the possibility of the statute of limitations remaining open under § 6501(c)(1) or (e)(1) because no facts that support it have been alleged. It is recommended, however, that the case be reevaluated with these possibilities in mind. However, if there is insufficient evidence of fraud or a substantial understatement, then the deposit must be refunded.

If you have any questions please call Bill Sabin at FTS 566-3233.

MARLENE GROSS

By: 
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